In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1251

ANTHONY B. CATALDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner instituted this action in the Court of Claims to recover $17,516, which was allegedly an amount owed by the United States on a contract it had entered into with the Ove Gustavsson Contracting Company ("Gustavsson"). The Court of Claims granted the government's motion to dismiss on the ground that petitioner's claim was barred by the Anti-Assignment Act, 31 U.S.C. 203, and the Assignment of Claims Act of 1940, 41 U.S.C. 15 (Pet. App. 36).

The Court of Claims petition alleged that the United States had paid Gustavsson for its contract work in 1960, but that Gustavsson had retained petitioner, who is an attorney, on a 50 percent contingent

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fee basis to pursue a claim for "extras" against the United States. On March 20, 1962, Gustavsson assigned all its rights in the claim for "extras" to Marine Midland Trust Company of New York, and on April 16, 1964, Marine Midland executed a further assignment of the claim to petitioner. Gustavsson also executed an assignment of its claim for "extras" to petitioner on May 23, 1963. The claim against the government was settled on or about March 20, 1963 for $17,516, but that amount has never been paid, nor has any warrant for payment been issued.

1. The Court of Claims correctly held that the assignments on which petitioner based his claim were rendered "absolutely null and void" (31 U.S.C. 203) by the federal statutes regulating the assignment of claims against the government. The 1962 assignment from Gustavsson to Marine Midland clearly failed to satisfy the requirements of the first clause of the Anti-Assignment Act because, *inter alia,* it was made before the claim had been liquidated, without the presence of two attesting witnesses and before any warrant for payment was issued. That assignment could, therefore, be valid only under the clause of 31 U.S.C. 203 which provides an exception for assignments to banks or other financing institutions. But under the explicit terms of that clause, "any such assignment * * * shall not be subject to further assignment * * *" (Pet. 5). Marine Midland's 1964 assignment to petitioner violated that restriction upon "further" assignments, and it was, therefore, invalid.

There is no merit to petitioner's contention (Pet. 20) that the reassignment in this case is saved by

the proviso permitting "any such assignment [to] be made to one party as agent or trustee for two or more parties participating in such financing." The petition did not allege that Marine Midland was an "agent or trustee" for petitioner when the claim was assigned to it, and petitioner does not assert that to be the fact. The statute does not authorize the assignee to make a further assignment to his "agent or trustee"; it merely permits the initial assignment to be made to a bank acting on behalf of another person.

Nor could the 1963 assignment by Gustavsson transfer a valid interest to petitioner. Gustavsson had validly assigned its claim to Marine Midland in 1962, and it had nothing left to transfer. Moreover, no warrant for payment had been issued, and such a warrant is a prerequisite for a valid assignment to a private person. 31 U.S.C. 203.

2. Petitioner contends that the prohibitions of the assignment statutes should not apply if the government has no offset or counterclaim against the amount in issue (Pet. 16–17). But one of the principal governmental interests that those statutes were designed to protect was the avoidance of embroilment "in conflicting claims, with delay and embarrassment and the chance of multiple liability." *Martin* v. *National Surety Corp.*, 300 U.S. 588, 594; *Segal* v. *Rochelle*, 382 U.S. 375, 384. There are conflicting claims in this case between petitioner and the contractor's surety (Pet. 18), and the statutes were plainly designed to apply in such a case. The *Martin* and *Segal* cases, *supra*, on which petitioner relies, involved disputes among private parties after the disbursement

had been made by the government. In these circumstances, the policies of the assignment statutes do not apply as they do when recovery is sought from the United States.

3. Petitioner's contention that he is entitled to recover one-half of the contractor's claim on his attorney's lien is unsound. This Court held in *Nutt* v. *Knut*, 200 U.S. 12, that the assignment statutes prohibited the creation of an attorney's lien upon funds of the United States. The Court of Claims has consistently held that the statutes prohibit an attorney from recovering directly from the government attorneys' fees on funds payable by the United States. *Pittman* v. *United States*, 127 Ct. Cl. 173, certiorari denied, 348 U.S. 815; *Empire Ordnance Corporation, et al.* v. *United States*, 130 Ct. Cl. 719; *Kearney* v. *United States*, 152 Ct. Cl. 202, certiorari denied, 366 U.S. 935.[1]

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[1] Petitioner urges that *Brooks* v. *Mandel-Witte Co.*, 54 F. 2d 992 (C.A. 2), certiorari denied, 286 U.S. 559, and *Malman* v. *United States*, 202 F. 2d 483 (C.A. 2), rehearing denied, 207 F. 2d 897, conflict with the decision of the Court of Claims in this case and with its earlier *Pittman*, *Kearney* and *Empire Ordnance* cases, *supra*. In *Brooks*, however, the United States had already disbursed the money which was the subject of the suit. And while the court in *Malman* assumed, in a footnote, that an attorney's lien under Section 475 of the New York Judiciary Law was not covered by the assignment provisions, the court's holding was that the attorney was not entitled to recover because of the government's right of set-off against the assignor. We also note that since *Malman* this Court has denied certiorari in the *Pittman* and *Kearney* cases.

4. The government's interest in this litigation is in making an appropriate disbursement of funds it owes, and in avoiding harassment and multiple liability. It is not, of course, interested in retaining possession of funds to which it is not entitled. Under the express terms of the assignment statutes, petitioner is not a proper party to bring an action for these funds and the Court of Claims correctly dismissed his claim. We respectfully submit that a petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

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